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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1746

ALFRED FAYER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioner submits this brief in reply to the government's brief in opposition, primarily to correct misstatements therein on the issues before the Court and to clarify Petitioner's position on those issues.

The government has incorrectly phrased the issue before the Court in such a way as to preclude review thereof. Thus, it states the question presented to be whether the doctrine of collateral estoppel bars the government from prosecuting a defendant for testifying falsely at a criminal trial at which he was acquitted. In simplifying the issue to one of whether it is automatically barred by a prior acquittal from prosecuting a defendant for perjury, the gov-

ernment has phrased a question *not* at issue herein and one which this Court answered long ago in the negative [*United States* v. *Williams*, 341 U.S. 58 (1951)], thus ignoring the only real issues presented, which have as yet never been resolved by this Court. Namely, the extent to which the doctrine of collateral estoppel precludes the government in a subsequent perjury prosecution from relitigating issues already determined by a prior acquittal *and* whether application of that doctrine bars it from using the identical evidence at the second trial. The government's brief addresses neither issue head on.

I.

Because of the conflict among the Circuit Courts, this Court should clarify the extent to which the principle of collateral estoppel governs subsequent prosecutions for perjury following an earlier acquittal.

Having so misstated the issue, the government proceeds to argue that an examination of the court's findings in Petitioner's first trial demonstrate that the issues raised by the four perjury counts had not been previously resolved against the government (Gov't. Br. 5).* In the ensuing analysis of those findings, the government adopts the Second Circuit's "restrictive reading" of this Court's reasoning in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), thus eschewing its warning that such analysis not be made in a "hypertechnical and archaic" manner. *Id.*, at 444. *United States*

* The government also urges in footnote 2 of its brief that this Court should decline jurisdiction under the concurrent sentence doctrine. We note, however, that said doctrine is *not* jurisdictional in nature, but is rather a matter of discretion with the Court. *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). Moreover, in the Court's most recent explication of this doctrine, it specifically declined to exercise such discretion, accepted certiorari and decided petitioner's claims on the merits. *Andresen* v. *Maryland*, 427 U.S. 463, 470 n.4 (1976).

v. *Hernandez*, 572 F.2d 218 n.5 (9th Cir. 1978). It proceeds to dissect the first court's findings and to slice into successively smaller portions conduct which was once judged in its entirety and when so judged, resulted in an acquittal.

By way of contrast and in direct conflict with the approach consistently followed by the Second Circuit, Judge Hufstedler of the Ninth Circuit in *Hernandez, supra,* adopted the more flexible rationale urged in *Ashe*. Rather than requiring an exact identity of issues between the former trial and the subsequent perjury prosecution as a predicate for application of the doctrine of collateral estoppel, the court was satisfied there by a mere overlap of issues. In the first prosecution, the defendant, a private attorney hired by the Department of Commerce to provide legal services to minority businessmen, had been charged with over-billing the Government for these services because he had in reality spent "substantially less" time providing legal services than he represented in his billings, in violation of 18 U.S.C. § 1001 (false statements). Although the trial court granted his post-trial motion for a judgment of acquittal, the government subsequently indicted him for perjury growing out of his testimony at the first trial concerning legal services that he claimed to have rendered for two minority businessmen, Iwamasa and Martinez. Iwamasa testified at the prior trial that he attended two to four meetings at which Hernandez and Martinez were present and that the discussions centered on prospective investments rather than legal advice. The government did not produce Martinez. Hernandez, testifying on his own behalf, denied over-billing the government and insisted that the meetings did involve legal matters. He also testified he met with Martinez alone several times and that these meetings were exclusively legal in nature. Obviously crediting Hernandez' version of the facts, the trial court entered a judgment of acquittal. Nevertheless, the prosecution indicted him for perjury, reciting in the indictment that the defendant lied when he testified that he met with Martinez

alone. In reversing the conviction for perjury, the Ninth Circuit reasoned that since Hernandez' explanation of his time spent alone with Martinez was "part of" his defense at the first trial and was thus weighed by the trier of fact, the court "necessarily" had to pass "at least in part" upon the truthfulness of his account, thus precluding the government from prosecuting him for perjury in that testimony. 572 F.2d at 222.

The foregoing discussion demonstrates the flexibility with which the courts in the Ninth Circuit address questions of collateral estoppel. See, also, *United States* v. *Nash*, 447 F.2d 1382 (4th Cir. 1971). Rather than insisting that the issue of the defendant's credibility be the only possible basis for the prior verdict of acquittal, they require only that it be at least a partial predicate therefor. Once that predicate is demonstrated, the government is barred from relitigating the issue of the defendant's credibility in a subsequent perjury prosecution.

By way of contrast, the Court of Appeals for the Second Circuit has given a very narrow and restrictive reading to *Ashe* and has never reversed a conviction on collateral estoppel grounds since that decision. Were the instant case to have arisen in the Ninth Circuit, there can be no doubt that it would have been reversed, since the first trier of fact made findings in the defendant's favor, specifically crediting his testimony.* The conflict in the Circuits is a direct result of the fact that this Court has never decided the rule which should govern prosecutions

*Although the government initially contended that the issue of collateral estoppel was waived with respect to Count 4, it does not press that argument, choosing to argue instead that Petitioner's double jeopardy claim is unsound on the merits (Gov't. Br. at 9). Should this Court decline to reach the merits, it is important to note, as we did in our initial brief, that the Circuit Courts are in conflict on the issue of waiver in a double jeopardy-collateral estoppel context and that the conflict should be resolved by this Court (Pet. Br. 12-13).

for perjury following an acquittal for a substantive offense. Given the growing frequency with which prosecutors indict for perjury following acquittal of the substantive offense, the issue is ripe for adjudication.

II.

This Court should resolve the question of whether a defendant may be prosecuted for perjury on the basis of the same evidence introduced at an earlier trial which resulted in an acquittal.

In its brief in opposition, the government has dealt only with the question of issue preclusion, ignoring entirely the equally important issue of whether it may, consonant with the Double Jeopardy Clause, use in a subsequent perjury prosecution the same evidence introduced in a prior trial which resulted in an acquittal. Nor has this issue ever been addressed by the Supreme Court. Indeed, the only court to rule on the question appears to be the Court of Appeals for the Fifth Circuit, which has resolved it in the negative. See, *e.g.*, *Wingate* v. *Wainwright*, 464 F.2d 209 (1972). The rule in that Circuit is that once a person has been acquitted of a charge against him, no evidence that he did in fact commit the crime may be introduced by the government in any subsequent prosecution, regardless of whether the relitigated issue is one of "ultimate" or "evidentiary" fact in the second prosecution. *Id.*, at 213. Thus, for example, where a defendant has been acquitted of assaulting one female, introduction in a subsequent prosecution for assault of a second female of identification testimony by the first female has been held to violate the collateral estoppel rule. *Blackburn* v. *Cross*, 510 F.2d 1014, *reh. den.*, 517 F.2d 464 (5th Cir. 1975). Similarly, in the retrial of Senator Gurney for, *inter alia*, perjury, the government was barred from eliciting from those of its witnesses who had testified against the defendant in the

earlier trial—which had resulted in a partial verdict of acquittal and a hung jury—any testimony bearing upon issues determined by the acquittal. *United States* v. *Gurney,* 418 F.Supp. 1265 (M.D. Fla. 1976).

No other Circuit, including the Second, appears to have gone as far as the Fifth in its expansive reading of the holding in *Ashe* v. *Swenson, supra.*

The government apparently does not dispute that the evidence adduced against Petitioner at his perjury trial was identical to that introduced at the earlier trial which ended in his acquittal. Nor was there any proof introduced at the second trial which was not available to the prosecution at the first trial. In proceeding against Petitioner a second time on the identical evidence—albeit under the guise of a different section of Title 18—the government has sought and obtained the forbidden second bite of the apple, forcing the defendant to run the gauntlet a second time in contravention of the Fifth Amendment. The rationale for the rule which bars the re-use of such evidence was succinctly stated in *Allen* v. *United States,* 194 Fed. 664, 667 (4th Cir. 1912):

> ". . . it is very hard to imagine any state of things which would justify an indictment for perjury of an acquitted defendant against whom the government offers no other substantial evidence than that which had been before the jury which had found him not guilty. The government and its prosecuting officers should not discredit the verdicts and judgments of its own courts by seeking to induce one jury to find that another gave a wrong verdict upon which is in all material respects the same testimony."

These principles are even more applicable where as here the second prosecution seeks to discredit the judgment of an experienced federal judge. See, also, *Youngblood* v. *United States,* 266 Fed. 795, 797 (8th Cir. 1920).

We urge the Court to adopt this salutory rule as an integral part of the Fifth Amendment's guarantee against double jeopardy and as a safeguard that an already acquitted defendant's rights thereunder will be protected.

CONCLUSION

The within petition for a writ of certiorari should be granted.

Respectfully submitted,

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